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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,
Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,

AND

UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICI CURIAE* SENATORS EDWARD M. KENNEDY, DANIEL K. AKAKA, TOM DASCHLE, CHRISTOPHER J. DODD, TOM HARKIN, JOHN F. KERRY, FRANK R. LAUTENBERG, CARL LEVIN, BARBARA A. MIKULSKI, AND JOHN D. ROCKEFELLER, AND REPRESENTATIVES CHARLES E. SCHUMER, JERROLD NADLER, THOMAS M. BARRETT, ROSCOE G. BARTLETT, HOWARD L. BERMAN, JOHN CONYERS, JR., WILLIAM D. DELAHUNT, RONALD V. DELLUMS, BOB FILNER, BARNEY FRANK, MARTIN FROST, LUIS V. GUTIERREZ, TONY P. HALL, JOHN LEWIS, NITA M. LOWEY, MARTIN T. MEEHAN, STEVEN SCHIFF, NORMAN SISISKY, FORTNEY PETE STARK, AND ROBERT WEXLER IN SUPPORT OF RESPONDENTS

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Pursuant to Rule 37, Senators Edward M. Kennedy, Daniel K. Akaka, Tom Daschle, Christopher J. Dodd, Tom Harkin, John F. Kerry, Frank R. Lautenberg, Carl Levin, Barbara A. Mikulski, and John D. Rockefeller, and Representatives Charles E. Schumer, Jerrold Nadler, Thomas M. Barrett, Roscoe G. Bartlett, Howard L. Berman, John Conyers, Jr., William D. Delahunt, Ronald V. Dellums, Bob Filner, Barney Frank, Martin Frost, Luis V. Gutierrez, Tony P. Hall, John Lewis, Nita M. Lowey, Martin T. Meehan, Steven Schiff, Norman Sisisky, Fortney Pete Stark, and Robert Wexler respectfully submit this brief as *amici curiae* to urge the Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit and uphold the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.[1]

INTEREST OF *AMICI CURIAE*

The *amici* are Members of Congress who are deeply interested in the continued vitality of the Religious Freedom Restoration Act, and many of whom participated in its enactment. As Senators and Representatives, moreover, *amici* have a profound interest in the scope of Congress' authority to enforce the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Congress enacted the Religious Freedom Restoration Act to protect religious freedom. Far from being unconstitutional, the Act is a permissible legislative effort to provide statutory protection for one of our most precious freedoms. Congress carefully considered the issue of religious liberty, and decided to provide additional statutory protections for this freedom above the constitutional floor. This congressional enactment is entirely consistent with the separation of powers; well within Congress' power under Section 5 of the Fourteenth Amendment; and appropriate under the Establishment Clause.

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[1] Counsel for both petitioner and respondents have consented to the participation of amici in this case, as evidenced in letters on file with the Court.

ARGUMENT

I. CONGRESS ENACTED THE RELIGIOUS FREEDOM RESTORATION ACT TO PROTECT RELIGIOUS FREEDOM

Congress enacted the Religious Freedom Restoration Act ("RFRA") to address substantial threats to the exercise of religious liberty. The legislation was adopted in 1993 with overwhelming bipartisan support—a 97-3 vote in the Senate, *see* 139 Cong. Rec. S14461, S14471 (daily ed. Oct. 27, 1993); unanimous consent in the House, 139 Cong. Rec. H8713 (daily ed. Nov. 3, 1993); and prompt signature by the President, 29 Weekly Comp. Pres. Doc. 2377 (Nov. 16, 1993). The legislation provides that government actions may not "substantially burden" the free exercise of religion unless the government has a "compelling governmental interest" and has used the "least restrictive means." 42 U.S.C. § 2000bb-1(b) (1994). The statute thus provides statutory protection for religious exercise beyond the constitutional minimum explicated by this Court in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

In the years following this Court's decision in *Smith*, Congress considered the state of religious liberty throughout the nation. Congress found a stark picture of harmful effects on religious minorities and potential governmental interference with the ability of groups and individuals to exercise their religious beliefs.

The Senate Judiciary Committee, for example, emphasized the testimony of Reverend Oliver S. Thomas. Appearing on behalf of both the Baptist Joint Committee on Public Affairs and the American Jewish Committee, Reverend Thomas testified about the harmful impact on religious exercise:

> Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction.

> Churches have been zoned out of even commercial areas. Jews have been subjected to autopsies in violation of their families' religious faith. * * * In time, every religion in America will suffer.

S. Rep. No. 103-111 at 7 (1993).

The congressional debates, moreover, contain extensive discussion of specific instances of threats to the exercise of religious liberty. Representative Hoyer, for example, noted that "Amish farmers have been forced to affix garish warning signs to their buggies, despite expert testimony that more modest silver reflector tape would be sufficient" and that a recent zoning case had prompted "a Minnesota trial judge to remark that churches have no more constitutional rights than adult movie theaters." 139 Cong. Rec. H2356, H2361 (daily ed. May 11, 1993). Representative Schumer similarly emphasized that "[t]he parade of horribles [has] already begun. In the 3 years since [*Smith*], evangelical store-front churches have been zoned out of commercial areas and Orthodox Jews and the H'mong people have been subjected to autopsies in violation of their religious faiths." 139 Cong. Rec. H2356, H2360 (daily ed. May 11, 1993). Representative Lowey reviewed instances in which "an individual could not display a cross on her own front lawn" and "individuals have been prevented from wearing yarmulkes, crosses, or rosaries." 139 Cong. Rec. H2356, H2362 (daily ed. May 11, 1993).[2]

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[2] *See also, e.g.*, 139 Cong. Rec. H2356, H2360 (daily ed. May 11, 1993) (Rep. Nadler) ("Our experience in the 3 years since *Smith* has demonstrated that religious minorities—and even majority religions—have been placed at a tremendous disadvantage."); 139 Cong. Rec. H2353 (daily ed. May 11, 1993) (Rep. Shepherd) ("[T]he religious rights of . . . groups like native Americans and Orthodox Jews continue to be sabotaged in the 3 years following the Supreme Court's decision. Without quick and decisive action, members of other faiths will face the same fate."); 139 Cong. Rec. E1243, E1244 (daily ed. May 12, 1993) (Rep. Franks) (RFRA addresses "the kind of Government discrimination which has resulted"); 139 Cong. Rec. H2356, H2357 (daily ed. May 11, 1993)

The Senate floor debate similarly included extensive discussion of threats to religious liberty. Emphasizing Reverend Thomas' testimony regarding the potential perils to religious observance, Senator Kennedy described "a climate in which the free exercise of religion is jeopardized" and explained that "a church denied the right to use wine in a communion service is just as adversely affected if the restriction is brought about by a general prohibition on alcohol consumption as by a specific law banning alcohol in religious services." 139 Cong. Rec. S14350, S14351 (daily ed. Oct. 26, 1993).

Senator Hatch likewise highlighted threats to religious freedom. 139 Cong. Rec. S14350, S14353 (daily ed. Oct. 26, 1993). Senator Hatch particularly stressed the experience of the Yangs, a Hmong family in Rhode Island whose son was subjected to an autopsy despite their "deeply held religious beliefs prohibiting the mutilation of the body through an autopsy." 139 Cong. Rec. S14350, 14353 (daily ed. Oct. 26, 1993). Although

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(Rep. Edwards) ("Autopsies have been unnecessarily and wrongly performed upon the Hmong and Jewish deceased in violation of strong religious feelings that autopsies should not be performed."); 139 Cong. Rec. H2356, H2363 (daily ed. May 11, 1993) (Rep. Maloney) ("The Jewish practices of kosher slaughter and circumcision, for example, might be threatened, as might the use of ceremonial wine, which is important to many faiths. Congregations of different religions have already run afoul of zoning regulations which have banned houses of worship in particular neighborhoods."); 139 Cong. Rec. H2356, H2357 (daily ed. May 11, 1993) (Rep. Fish) ("individuals seeking to practice their religion, unhampered by Government action, have largely been without recourse"); 139 Cong. Rec. E1234 (daily ed. May 12, 1993) (Rep. Cardin) ("Veterans have been denied the right to be buried in some veterans' cemeteries on Saturday and Sunday even if their religious beliefs required it; the Amish have been forced by state law to display fluorescent orange emblems on their horse-drawn carriages even though this violates their religious beliefs; autopsies have been performed on individuals whose religious beliefs prohibit autopsies even though the State was unable to show a compelling reason for performing the autopsy; and on and on.").

a district court initially had ruled in favor of the Yangs, the court recalled the decision and reversed course in light of *Smith*. As Senator Hatch recounted, Senior Judge Pettine nevertheless described his reaction to the plight of the Yangs, whose deep religious objections to autopsies had been brushed aside by the government:

> My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of a large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs' testimony provided stark support for the depth of the Yangs' grief.

Id. (quoting *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990)); *see also* 139 Cong. Rec. S14515, 14516 (daily ed. Oct. 27, 1993) (Sen. Chafee) (describing the Yangs' experience and explaining that, "without congressional action . . . they and many, many others like them are and will remain helpless to prevent similar violations . . . Rhode Islanders and other Americans who are religious—be they Catholic, Moslem, Quaker, or Buddhist—may find themselves subject someday to apparently neutral government restrictions that nonetheless impair their ability to practice their religion").

Congressional hearings similarly presented extensive examples of particular threats to religious liberty posed by laws of general applicability. Mr. Yang, whose plight was described by Senator Hatch, testified about his ordeal in both the Senate and the House.[3] Witnesses submitted

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[3] *See The Religious Freedom Restoration Act: Hearings on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 5-6, 14-28 (1992) ("Senate Hearings"); *Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 107-16 (1992) ("House Hearings").

to Congress detailed analyses of the effects of laws of general applicability on religious exercise.[4] These effects included both the difficulty of proving intentional discrimination against minority religions—a point specifically emphasized by the House Judiciary Committee, H. Rep. No. 88 at 5 (1993)—and the harmful impact of substantial burdens on religious exercise even in the absence of intentional discrimination. *See, e.g.*, House Hearings at 104-107. Witnesses describing threats to religious liberty included representatives from a wide range of religious groups, legal scholars, and representatives of civil liberties organizations.[5] Testimony from these hearings was repeatedly invoked during the legislative consideration of RFRA.[6]

In light of these threats, Senators and Representatives emphasized that RFRA was essential to preserve, protect, and enhance the fundamental constitutional right to religious liberty. As Senator Dole explained, RFRA "allow[s] people with sincere religious beliefs to act upon those beliefs . . . without having to run the gauntlet of unnecessarily large Government roadblocks." 139 Cong. Rec. S14465, S14466 (daily ed. Oct. 27, 1993). Numerous legislators stressed the importance of religious freedom in American society. As Representative Nadler emphasized, "[w]hat has made the American experiment work—what has saved us from the poisonous hatreds that are consuming other nations—has been a tolerance and a respect for diversity enshrined in the freedom of religion clauses of our Bill of Rights." 139 Cong. Rec. H2359 (daily ed. May 11, 1993). Senator Grassley similarly explained that "freedom of worship is one of the fundamental rights on which our nation was founded. . . .

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[4] *See, e.g.*, Senate Hearings at 50-58; House Hearings at 361-69.

[5] *See* Senate Hearings, *supra*; House Hearings, *supra*.

[6] *See, e.g.*, H. Rep. No. 88 at 2 n.2 (1993); S. Rep. No. 111 at 4 n.3, 7; 139 Cong. Rec. S2824 (daily ed. March 11, 1993) (Sen. Hatch); 139 Cong. Rec. H2356, H2361 (daily ed. May 11, 1993) (Rep. Orton).

It is important that we put the burden on Government to justify itself when it wishes to hinder the free exercise of religion." 139 Cong. Rec. S14469 (daily ed. Oct. 27, 1993).[7]

RFRA was enacted to prevent unnecessary and substantially burdensome government interference with the exercise of religious liberty. Congress discerned a pervasive and substantial threat to religious freedom, and enacted legislation to provide statutory protection for this fundamental constitutional right.

II. THE RELIGIOUS FREEDOM RESTORATION ACT DOES NOT VIOLATE THE SEPARATION OF POWERS

Congress' authority to provide statutory rights beyond constitutional requirements is well-established and perfectly consistent with the separation of powers. RFRA established a statutory right beyond the constitutional minimum elucidated by this Court in *Smith*. Far from violating the separation of powers, such a legislative decision

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[7] *See also, e.g.*, 139 Cong. Rec. S2822 (daily ed. March 11, 1993) (Sen. Kennedy) ("Few issues are more fundamental to our country. America was founded as a land of religious freedom and a haven from religious persecution."); 139 Cong. Rec. S14515, S14516 (daily ed. Oct. 27, 1993) (Sen. Chafee) ("Ensuring that each American has the right to exercise his or her religious beliefs goes straight to the heart of what this Nation is all about."); 139 Cong. Rec. H2356, H2360 (daily ed. May 11, 1993) (Rep. Goodlatte) ("we owe it to our heritage and to our children and grandchildren to protect these religious freedoms won at such great cost"); 139 Cong. Rec. S14461, S14469 (daily ed. Oct. 27, 1993) (Sen. Bradley) ("[o]ur nation's commitment to individual religious liberty is as old as our Nation itself—indeed, older. This long tradition of upholding the right to practice one's religion freely, without the unnecessary interference of Government, remains a core element of our national heritage" and "a bedrock in our societal framework"); 139 Cong. Rec. H2356, H2363 (daily ed. May 11, 1993) (Rep. Maloney) ("Freedom of religion is a fundamental right which transcends ideological, religious, and partisan differences.").

to provide statutory protection above a constitutional floor is an entirely appropriate exercise of legislative authority.

Congress' legislative authority to establish additional statutory protections beyond a constitutional floor is settled. For example, although this Court found that the Constitution prohibits only election practices undertaken with discriminatory intent, *Mobile v. Bolden*, 446 U.S. 55 (1980), it readily applied the Voting Rights Act of 1982, which nonetheless banned certain election practices with discriminatory effects. *Thornburg v. Gingles*, 478 U.S. 30 (1986). Similarly, although this Court held that the Constitution does not prohibit literacy tests as a prerequisite to the right to vote, *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), it upheld Congress' subsequent prohibition on such literacy tests. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Gaston County v. United States*, 395 U.S. 285 (1969). The Court nowhere suggested that Congress' decision to provide statutory protections above the constitutional minimum somehow violated the separation of powers, or represented an attempt by Congress to "usurp" the role of this Court.

In the specific context of accommodating religious liberty, moreover, it is quite clear that legislative accommodation of religious practices beyond constitutional requirements does not represent an impermissible or inappropriate legislative role. *See, e.g., Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2492 (1994); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1970); *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 673 (1970). Indeed, in the *Smith* decision itself, this Court emphasized the legislative discretion to provide protection beyond the constitutional requirements articulated by the Court in *Smith*:

> Just as a society that believes in the negative protection accorded to the press by the First Amend-

> ment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. Even while holding in *Smith* that the religious exercise at issue was not constitutionally protected, this Court observed that government may provide legislative accommodation for religious exercise through exceptions to generally applicable statutes. The Court held that legislative accommodation may be addressed in "the political process" and emphasized the differences between the judicial and legislative roles: "to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." *Id.* Rather than representing a separation of powers problem, legislative accommodation of religious observance embodies precisely the kind of permissible additional statutory protection that has been recognized and upheld.

Nor, contrary to petitioner's suggestion, does commentary on *Smith* during the legislative process somehow render RFRA a violation of the separation of powers. It is, of course, beyond dispute that Members of Congress are permitted to legislate in the context of considering the effect of Supreme Court decisions.[8] Congressional

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[8] *See, e.g., Thornburg v. Gingles*, 478 U.S. at 35 ("The amendment [to the Voting Rights Act] was *largely a response to this Court's plurality opinion* in *Mobile v. Bolden*, 446 U.S. 55 (1980), which had declared that, in order to establish a violation either of Sec. 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by this Court in *White v. Regester*, 412 U.S. 755 (1973).") (emphasis added).

debate and discussion concerning Supreme Court decisions and their effects are entirely appropriate, and raise no separation of powers problems.[9]

In addition, RFRA's legislative history makes explicit Congress' understanding that this Court's decision in *Smith* controls the constitutional interpretation, and that Congress' intent was to provide statutory protection above that constitutional floor.[10] Even if the legislative record were less explicit on this point, moreover, the pertinent inquiry is the function and effect of the statute. By funtion and effect, RFRA clearly provides statutory protection above and beyond the constitutional minimum.

In sum, therefore, RFRA represents a determination by the Legislative Branch to provide additional statutory protection for religious observances beyond the constitutional requirements set forth in *Smith*. This is not a violation of the separation of powers doctrine. It is the separation of powers doctrine at work.[11]

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[9] If legislation enacted in response to a Supreme Court decision were to *violate* the Constitution, of course, the legislation could not prevail. *See, e.g., United States v. Eichman*, 496 U.S. 310 (1990) (holding Flag Protection Act unconstitutional in light of *Texas v. Johnson*, 491 U.S. 397 (1989)).

[10] *See, e.g.*, S. Rep. No. 111 at 14 n.43 ("While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action. . . ."); H. Rep. No. 88 at 9 (in enacting RFRA, "Congress appropriately creates a statutory right within the perimeter of its power"); 139 Cong. Rec. H2356, H2358 (daily ed. May 11, 1993) (Rep. Hyde) ("the Congress writes laws—it does not and cannot overrule the Supreme Court's interpretation of the Constitution . . . . [RFRA] is a proposed federal statute and its meaning will be determined by its plain language and, to some extent, by the intent of Congress in enacting it.").

[11] Every Court of Appeals that has decided the issue, including the Fifth Circuit in this case, likewise has concluded that RFRA

III. RFRA IS WELL WITHIN CONGRESS' AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., amend. XIV, § 5. RFRA is well within Congress' authority under this Amendment.

Legislation under Section 5 will be upheld if it is (i) "an enactment to enforce" the Fourteenth Amendment; (ii) is "plainly adapted to that end"; and (iii) does not violate any other constitutional limitations. *Katzenbach v. Morgan*, 384 U.S. at 651-52.[12] RFRA readily satisfies

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does not violate the separation of powers. *See Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (Posner, C.J.), *petition for cert. pending*, No. 96-710 (filed Oct. 29, 1996) ("Congress has not 'overruled' *Smith* or assumed a paramount authority of constitutional interpretation in derogation of the Supreme Court's authority under Article III. *Smith* remains undisturbed within its domain, that of the meaning of the First Amendment. The Religious Freedom Restoration Act does not alter that meaning. It creates a new statutory right designed to buttress the constitutional right."); *EEOC v. Catholic University of America*, 83 F.3d 455, 469 (D.C. Cir. 1996) (Buckley, J.) ("Congress's objective in enacting the statute was to overturn the *effects* of the *Smith* decision, not the decision itself. The Act does nothing more than substitute a statutory test for the constitutional test that *Smith* found not to be mandated by the Free Exercise Clause in cases where the right of free exercise was burdened by a neutral law of general application").

[12] The *Morgan* standard is derived from venerable precedents dating back to the era of the Civil War Amendments themselves. *See Ex parte Virginia*, 100 U.S. 339, 345-46 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880). It has been applied repeatedly by this Court. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 177 (1980) (applying test in Fifteenth Amendment context); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976) (Fourteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966) (Fifteenth Amendment).

this standard, and lies comfortably within bounds already recognized by this Court.

First, RFRA is "an enactment to enforce" the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. at 652. The Fourteenth Amendment applies the First Amendment's protection of religious liberty to the States. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). RFRA plainly is an enactment to protect the right of religious freedom embodied in the Fourteenth Amendment. The explicit statutory purpose is to "guarantee" the applicability of the compelling interest test "in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb-(b)(1). The term "exercise of religion," in turn, is defined as "the exercise of religion under the First Amendment to the Constitution." *Id.* at § 2000bb-2(4). Moreover, as discussed (Section I, *supra*), the legislative record contains extensive discussion of the threats to religious liberty that RFRA was enacted to address. The purpose of RFRA clearly is to enforce the Fourteenth Amendment's guarantee of religious liberty.

Petitioner suggests that RFRA fails to satisfy this standard because it encompasses conduct that is not itself constitutionally protected under *Smith*. Pet. Br. at 30-31. This suggestion, however, reflects a fundamental misconception about the scope of Congress' authority under Section 5. This Court repeatedly has found that Congress' Section 5 authority "to enforce" constitutional guarantees is not confined to actions that violate the Constitution. *See, e.g., Thornburg v. Gingles*, 478 U.S. at 35 (applying prohibition on voting practices with a discriminatory effect, even though the Fourteenth and Fifteenth Amendments prohibit only intentional discrimination); *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (Congress "may prohibit practices that in and of themselves do not violate" the Constitution); *Morgan*, 384 U.S. at 648-49 (Congress may ban the use of literacy tests as voting requirements even though the Fourteenth and Fifteenth

Amendments do not prohibit the use of such tests). In order to ensure the protection and efficacy of constitutional rights, Section 5 gives Congress authority to enact statutory protections concerning actions that pose a substantial threat to constitutional rights even if the proscribed action itself has not been found unconstitutional.

Second, RFRA is "plainly adapted" to the goal of protecting the constitutional guarantee of religious liberty. *Morgan*, 384 U.S. at 648-50. RFRA requires government to accommodate religious practice, where possible and appropriate. *See* 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."). In response to the substantial threats to religious liberty posed by laws of general applicability, Congress crafted a statute to address this perceived danger to a fundamental constitutional right. Indeed, as discussed (page 9, *supra*), legislative accommodation is a familiar and accepted means of fostering religious freedom. *See, e.g., Smith*, 494 U.S. at 890; *Corporation of the Presiding Bishop v. Amos*, 483 U.S. at 334; *Walz v. Tax Comm'n of New York City*, 397 U.S. at 673. RFRA's legislative accommodation serves to combat substantial threats to religious freedom, including threats posed by government insensitivity to, or ignorance of, religious observance.[13] In short, RFRA was "plainly adapted" to the goal of protecting religious freedom.

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[13] *See generally Sasnett v. Sullivan*, 91 F.3d at 1021-22 ("It is not an accident that we have Sunday closing laws rather than Thursday closing laws. Religions that have fewer members, especially if those members are drawn from the margins of society, do not have sufficient influence over the legislative process to avoid being flailed by the dinosaur's tail of legislation of general applicability, legislation not motivated by any animus toward minor sects but merely insensitive to their interests—possibly even oblivious

Petitioner's principal objection to the "plainly adapted" conclusion again rests on the flawed premise that Congress has little, if any, authority to address conduct that might itself not be adjudicated a constitutional violation. Pet. Br. at 31-32. As discussed (pages 13-14, *supra*), this Court has held on numerous occasions that Congress has authority to adopt statutory protections that enforce constitutional rights beyond the four corners of actions already adjudicated to be unconstitutional. In adopting legislative accommodation to religious observances, Congress was employing an established and appropriate means of enforcing the right to religious liberty. As this Court has recognized, laws of general applicability may burden the exercise of religious liberty. *See, e.g., Smith*, 494 U.S. at 890. Section 5 gives Congress the authority to remove substantial burdens on this constitutional right, even if the burden itself would not be found unconstitutional.[14]

Third, RFRA is "consist[ent] with the letter and spirit of the constitution." *Katzenbach*, 384 U.S. at 650. RFRA protects a fundamental freedom, applicable to the States through the Fourteenth Amendment. Contrary to petitioner's suggestion, requiring accommodation of the exercise of religious liberty does not violate "principles of federalism" and the Tenth Amendment.

At the outset, it is important to clarify that Congress' Section 5 enforcement authority must be analyzed in the

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to their existence. The formal right of the members of these sects to the free exercise of their religion may have little practical value if observance is made onerous by general-purpose legislation.").

[14] Petitioner suggests that any "prophylactic" legislation under Section 5 must be accompanied by detailed factual findings, and that RFRA fails this standard. Petitioner's contention is erroneous. First, factual findings are not required to support congressional legislation. *See, e.g., United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995). Second, as discussed (Section I, *supra*), the legislative record of RFRA is replete with discussion of the threats to religious freedom that RFRA is intended to address.

context of the Civil Rights Amendments, whose very purpose was to guarantee protection and enforcement of constitutional rights in the States. In the very first case interpreting Section 5 of the Fourteenth Amendment, this Court determined that "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. at 345. Accordingly, enforcement of the provisions of the Amendments by Congress "is no invasion of State sovereignty." *Id.* at 346.[15] In short, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden" by Congress' broad power to enforce the Civil War Amendments." *City of Rome v. United States*, 446 U.S. at 179.[16]

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[15] *See also Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1125 (1996) (the Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution"); *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991) (federalism principles "are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (Civil War Amendments "worked a dramatic change in the balance between congressional and state power"); *Fitzpatrick v. Bitzer*, 427 U.S. at 456 ("When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authortiy under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.").

[16] Petitioner's reliance on cases unrelated to the Fourteenth Amendment, such as *United States v. Lopez*, 115 S. Ct. 1624 (1995) and *New York v. United States*, 505 U.S. 144 (1992), thus is inapposite. Petitioner's reliance on *Oregon v. Mitchell*, 400 U.S. 112 (1970) also is misplaced because Congress' effort to lower the voting age in state elections conflicted with Article 1,

Particularly when viewed in this context, RFRA plainly does not violate principles of federalism. Religious liberty is a fundamental freedom, made applicable to the States by the Fourteenth Amendment and enforceable in the States by Congress under Section 5. The purpose of the legislation—the protection of religious liberty—is squarely within the mission of the Fourteenth Amendment. RFRA, moreover, does not direct or compel any particular state legislation on any particular subject. Even with regard to state actions that burden religious observance, the statute does not prohibit such enactments: it applies only to enactments that "*substantially*" burden religious observance, and prohibits only substantial burdens that are not justified by a "compelling governmental interest" and "the least restrictive means." 42 U.S.C. § 2000bb-1(b) (emphasis added). RFRA's accommodation of religious liberty appropriately ensures the protection of constitutional rights, and does not violate principles of federalism and the Tenth Amendment.

Petitioner's suggestion that this Court should overrule or sharply restrict *Katzenbach v. Morgan* should be rejected. As this Court repeatedly has recognized, Section 5 grants Congress broad legislative discretion in enforcing the constitutional guarantees of the Civil Rights Amend-

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§ 2. *See, e.g., id.* at 125-26; *see also id.* at 117-19 (upholding other congressional enactments). To the extent that petitioner suggests that constitutional rights incorporated by the Fourteenth Amendment, such as religious freedom, should be accorded a different standard than other constitutional rights, petitioner's contention would create an unprecedented and inappropriate hierarchy of rights within the Fourteenth Amendment. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 693-95 (1978). In any event, RFRA also enforces equal protection rights under the Fourteenth Amendment. *See e.g.*, S. Rep. No. 111 at 8; House Hearings at 326 (statement of Douglas Laycock); 139 Cong. Rec. E1243 (daily ed. May 11, 1993) (Rep. Franks) (discussing "especially burdensome" implications "for those whose beliefs lie within the religious minority."); *Flores* v. *City of Boerne*, 73 F.3d 1352, 1360 (5th Cir. 1996).

ments.[17] As this Court observed more than three decades ago, "[a] construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." *Morgan*, 384 U.S. at 648. Restricting Congress' authority to the boundaries of conduct that itself would be adjudicated unconstitutional—and denying Congress the ability to craft statutory protections and enforcement mechanisms that alleviate substantial burdens on Fourteenth Amendment rights—"would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." *Id.* at 648-49. A proper understanding of the Fourteenth Amendment's mission of ensuring the enforcement of constitutional rights—and of Section 5's role within the Fourteenth Amendment—precludes such a truncated view of Congress' authority and discretion.

In enacting RFRA, Congress acted to enforce and protect the Fourteenth Amendment's guarantee of religious liberty. The statute was well within Congress' authority under Section 5 of the Fourteenth Amendment.

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[17] *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. at 490 (opinion of O'Connor, J.) ("The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."); *Maher v. Gagne*, 448 U.S. 122, 132 (1980); *Strauder v. West Virginia*, 100 U.S. at 312.

IV. THE RELIGIOUS FREEDOM RESTORATION ACT IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

RFRA's protection of religious liberty comports with the Establishment Clause. "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 334 (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987) (footnote omitted)). It is well-established, moreover, that "the limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334. Congress' determination that, before imposing a "substantial burden" on religious observance, the government must have a compelling interest and apply the least restrictive means represents "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Comm'n of New York*, 397 U.S. at 669.

Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), an Establishment Clause challenge to legislation requires that the legislation be subjected to a three-part inquiry: (1) whether its purpose is permissible; (2) whether its effect is to advance or inhibit religion; and (3) whether its administration will foster excessive government entanglement with religion. RFRA readily satisfies this standard, and raises no Establishment Clause problem.[18]

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[18] Individual Justices have advocated alternative Establishment Clause standards. *See, e.g., Grumet*, 114 S. Ct. at 2495-2500 (O'Connor, J., concurring in part and concurring in the judgment); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 397 (1993) (Scalia, J., concurring in the judgment). For the reasons explained in the text, RFRA also satisfies the Establishment Clause under any of the alternative standards that have been proposed.

With regard to the legislative purpose, RFRA is designed to accommodate religious observance. Such accommodation unquestionably is a permissible legislative goal and is not invalid under the Establishment Clause. *See, e.g., Amos*, 483 U.S. at 335 ("it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions"). Indeed, as noted (page 10, *supra*), this Court in *Smith* specifically found that accommodation may be addressed in "the political process." *Smith*, 494 U.S. at 890.

With regard to RFRA's *effect*, the Act does not itself impose the type of benefits or burdens that have traditionally raised constitutional concerns. *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). Rather, as a general statute, the only benefit the Act confers is that government will not lightly burden religious practice. This type of accommodation merely permits religious exercise without interference, the type of "benevolent neutrality" previously approved by this Court. *Walz*, 397 U.S. at 669. "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' . . . it must be fair to say that the government itself has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337.[19]

Finally, RFRA also does not result in excessive government entanglement in religious practices. To the contrary, the Act imposes additional limitations on governmental interference with religion. Certainly the Act does not create any type of program "whose very nature is apt to entangle the state in details of administration." *Lemon v. Kurtzman*, 403 U.S. at 615 (citation omitted); *see*

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[19] In addition, by treating all religions equally, RFRA does not implicate Establishment Clause concerns raised by favoring one sect over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see Smith*, 494 U.S. at 886 n.3.

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). RFRA furthers the principle of separation of church and state by ensuring that government will not unnecessarily impose substantial burdens on religious exercise. Thus, just as in *Amos*, "[i]t cannot be seriously contended that [the Act] impermissibly entangles church and state; the statute effectuates a more complete separation of the two." *Amos*, 483 U.S. at 339.[20]

RFRA's purposes, effects, and required governmental role are entirely consistent with the command of the Establishment Clause.

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[20] The Act explicitly states "Establishment Clause Unaffected—Nothing in this chapter shall be construed to affect, interpret or in any way address [the Establishment Clause]. Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause shall not constitute a violation of this chapter." 42 U.S.C. § 2000bb-4. As the Fifth Circuit duly noted, the Act itself therefore "provides that the accommodations mandated by RFRA may reach up to the limit permitted by the Establishment Clause but no further." *Flores*, 73 F.3d at 1364.

CONCLUSION

The Religious Freedom Restoration Act protects the fundamental freedom of religious liberty. It is a legislative accommodation of religious observance that goes beyond the minimum constitutional requirements delineated by this Court in *Smith*. Such an enactment is an appropriate legislative function under the separation of powers; is within Congress' authority to enforce constitutional rights under Section 5; and fully comports with the Establishment Clause. Accordingly, this Court should uphold the constitutionality of the Religious Freedom Restoration Act and affirm the judgment of the Court of Appeals.

Respectfully submitted,

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